

Northwest Montana Association of REALTORS®
White paper regarding the following subject:

WATER RIGHTS COMPACT
ENTERED INTO BY
THE CONFEDERATED SALISH & KOOTENAI TRIBES,
THE STATE OF MONTANA, AND
UNITED STATES OF AMERICA
DRAFT LEGISLATION LABELED
“JULY 28, 2010: WORKING DRAFT - FOR DISCUSSION PURPOSES ONLY”

Preamble

Northwest Montana Association of REALTORS® (NMAR) has always been concerned with water issues and has always been one of the leading organizations fighting for property and water rights in the Flathead valley. We believe that it is paramount for a good and stable economy to exist that our citizens have the right to own and develop property. One of the key components to owning property is the ability to own water rights for the beneficial use of that property.

For the past decade, NMAR has monitored the Water Rights Compact Commission (WRCC) and the progress that has been made toward the resolution of defining water rights between the CONFEDERATED SALISH & KOOTENAI TRIBES (CSKT) and the State of Montana. NMAR believes that water is one of the most valuable rights that land owners, cities and communities have in Montana. Without water and the right to use it, our lands become less valuable and productive and will make it very difficult for our communities to grow and be sustainable. While trying to draft a compact these are just a few of the reasons that NMAR is concerned about the (1) WRCC not establishing a baseline quantity of water that is available for consumptive and non-consumptive use in the Flathead Basin; and (2) the CSKT not disclosing the amount of water that they are currently using.

Without understanding the amount of water that is available and the amount of water that is currently consumed, can the WRCC make fair and equitable decisions that will affect the Flathead Valley and the Reservation for time immemorial?

During the previous year the Compact Commission has been agreeing to specific terms that will affect the Flathead valley at an alarming speed and without time for consideration of the terms' effects. For example, the WRCC unilaterally moved the claim date of the Flathead Irrigation Project (FIP) water rights from 1908 to 1855. This re-writing of history and disregard for Montana law laws (first in time, first in right) affects not only the pre-1908 water rights which may have been superior in time and right and are now “junior” claims to the FIP water rights, but also the post-1908 junior water rights which are now superseded and moved further back in the line of water right claims.

Is moving the 1908 FIP water right to 1855 fair to the water rights holders in the water basin, and what are its effects?

Throughout the WRCC negotiations, the “Law of Administration” has remained undefined yet it governs how the newly constructed Water Board will administer water rights, conservation, fines and fees. If these new proposed regulations are not negotiated with the State of Montana open meetings laws in mind, then how will the public be able to address the issues in a manner that will define how the regulations are crafted? Another major concern is the Water Board's composition. The manner described could allow for an all Tribal Water Board, without proper representation for non-tribal members. There is further concern about the Water Board's ability to set fees and penalties as well as remove individual's water rights if they do not comply with the Water Board's rulings; i.e., required water conservation.

These are just a few of the concerns that NMAR has regarding the current WRCC "Working Draft - For Discussion Purposes Only" proposed legislation. If the system of claiming a water right is in jeopardy and there is no water available then what does that do to your property value? How can the cities grow, how can we maintain a vibrant economy or even repair the economy we currently are in?

How will the Water Board be composed to ensure fairness and due process to all?

History

1855 Hellgate Treaty

The Hellgate Treaty of 1855 (signed April 18, 1859) created the Confederated Salish Kootenai Tribes of the Flathead Reservation.

Winters v. United States 1908

By an 8 to 1 decision, the United States Supreme Court held that when the US Government created a reservation certain reserved water rights were granted to the reservation inhabitants at the same time. The court relied upon *United States v. Winans* (1905), and explained that ambiguities existing in the treaty which created the Fort Belknap Indian Reservation must be interpreted in favor of the Tribe, thereby establishing water rights for the Tribes at the time the treaties were ratified.

In the *Winters* decision, Justice Joseph McKenna emphasized that the reservation was created to change the Native Americans' "nomadic and uncivilized" habits, making them into "a pastoral and civilized people," and without water to irrigate the lands, the reservation would be "practically valueless" and "civilized communities could not be established thereon." The court summarized that without water the fundamental purpose of the reservation would be "impaired or defeated." Critical to the issue presented to the WRCC, the Supreme Court ruled in *Winters* that the quantity of water reserved for Native American use was the amount sufficient to irrigate all the practical reservation acreage.

Arizona v California 1963

Starting in 1934, Arizona argued that the Colorado River Compact was unconstitutional and the US Supreme Court claimed to be the court of original jurisdiction. Furthermore, in the 1963 court case the Supreme Court specified the amount of water to which each state in the Colorado River Compact was entitled, thus setting that in motion the ability of the courts to adjudicate water rights within the states.

Montana Water Rights

Article IX Section 3 (4) of the 1972 Montana Constitution directs the Montana legislature to "provide for the administration, control and regulation of water rights and establish a system of centralized records." Since before statehood, people had been acquiring water rights in one of two ways, either by diverting water and putting it to use or later by posting a notice of intent to use water and filing the notice with the county clerk. No written record existed for rights acquired the first way, the so-called use rights. Montana courts struck down part of the second process, so for over 100 years water rights were developed without any centralized record keeping. In response to the Constitution's directive, the Montana legislature in 1973 passed the Montana Water Use Act, which established a centralized record system for water rights and required that all water rights existing prior to July 1, 1973 must be finalized, documented and quantified through statewide water rights adjudication in state courts. In 1979, the Montana legislature largely adopted the Subcommittee recommendations and mandated a statewide adjudication of all pre-July 1, 1973 water rights and created the Montana Water Court to implement it.

Federal law affects the water rights within Montana's boundaries as water flows across boundaries of states and reservations. In *Winters*, the Supreme Court held that when Congress or the President sets aside land out of the public domain for a specific federal purpose, such as an Indian reservation, National Park, or National Forest, a quantity of water is impliedly reserved which is necessary to fulfill that primary federal purpose. In 1952, the United States Congress passed the McCarran Amendment, which subjected federal reserved water right determinations to state court.¹

OUTLINE DESCRIPTION OF THE
"WORKING DRAFT - FOR DISCUSSION PURPOSES ONLY"
DATED JULY 28, 2010

This working draft legislation labeled "DRAFT - NOT A PROPOSAL AND NOT A BASIS OF NEGOTIATION" sets forth the outline of how water and water rights on the Flathead Indian Reservation are to be administered. This draft legislation lays out the basic definitions of water and water rights terms as well as defining water rights owners and other stakeholders of water on the reservation. Also described in the draft legislation is Tribal Water Rights (yet to be determined) as well as how the Water Rights Compact will be implemented.

ISSUES OF CONCERN

Quantifying Tribal Water Rights

1. With the creation of the Water Management Board, the premise of the compact has shifted to water management and not the amount of water rights to which the Tribe is entitled.
2. CSKT needs to disclose the amount of water that they currently use and the number of wells that have been drilled since 1996.
3. There needs to be a clear definition of "aboriginal" water rights with a specific start date, not just a vague reference to time immemorial, otherwise the Tribe will always be "**first in time, first in right.**"

Water Management Board

4. The creation of the Water Management Board for the Flathead Indian Reservation:
 - This will create a new bureaucracy that is not elected but appointed that will have the ability to control how all water and water rights are administered on the Reservation.
 - The Board does not have well designed checks and balances with respect to the power it will yield.
 - The Board in its original design has the ability to be dominated by one stakeholder and not balanced; i.e., the Tribe has the ability to control the board as it is currently designed.

Open Meeting Laws

5. It appears that most of the real negotiations regarding the Water Compact have been held in closed door sessions between the State, Tribal and Federal attorneys. Such meetings are held so as to negotiate difficult issues such as:
 - Moving the Flathead Irrigation Project (authorized in 1904 through the Flathead Indian Allotment Act) water rights to 1855 and not the Project creation date of 1908.
 - The inclusion of water rights to be allocated for wet lands.
 - The proposed allotment of 90,000 acre feet of water out of Hungry Horse Dam.

¹ White paper on the Montana Water Rights Adjudication issued by the Upper Clark Fork River Basin Steering Committee March 2, 2004

Law of Administration

6. This proposed regulation would give the newly constituted Water Management Board the following powers:
 - Issuance of New Permits.
 - Create acceptable mitigation plans.
 - Changes in uses of water rights on reservation.
 - To resolve any controversies.
 - To create fines and fees
 - To create a budget with little or no oversight.
 - To hire a Water Engineer with far reaching control.
 - With these newly constituted powers the Water Management Board, without the proper checks and balance, will have the ability to have absolute control of all water usage on the reservation. The Board will not be governed by state law and thus the non tribal/tribal citizens on the reservation will not have the same protection from abuse of power as other Montana citizens share. The powers granted to the Water Management Board and the Water Engineer will be too far reaching and without proper oversight.
7. Other areas of concern with the Law of Administration:
 - How the composition of the Board Member will ensure a fair administrative process through which all rights are equally protected.
 - The autonomy of the Board appears to fail to protect stakeholders' rights and that autonomy may result in an inequitable appeal process.
 - There is a lack of accountability of the Water Management Board to anyone.

Off Reservation Water Rights Issues

8. Water rights claims on the Reservation stand at roughly 43 Million acre feet (there are some duplicate water rights made within these claims that need to be sorted out) yet there are only approximately 9 Million acre feet of water available in the Flathead unitary basin.
9. Moving the Flathead Irrigation Project water rights from 1908 to 1855 will affect off- reservation water rights significantly, and these off-reservation water rights have been ignored in the WRCC process.
10. There has been no attempt to quantify all the waters in the Flathead Basin (both surface and ground water). Nor has any attempt been made to determine how much water can be made available for future growth in the Flathead valley compared to new water rights that will be given to the CKST and its future use.
11. There has been no attempt to determine the affect the WRCC has on off-reservation water rights holders or to delineate how the CSKT water right of 1855 will be interpreted consisted with Montana water law of "**first in time, first in right.**"

Conclusion

Since the lawsuit between the CSKT and the State of Montana commenced in 1996, landowners who have drilled wells and implements uses of water have been unable to make a water right claim. These undocumented water claims, along with the thousands of water rights claims that are in limbo due to the litigation, demand respect of the law and of the WRCC.

As set forth herein, these issues need to be addressed during the negotiations of the WRCC to ensure a fair and equitable result for all involved and a lasting resolution to this dispute.

NMAR believes that the following items need to be completed before the WRCC continues down the current path in which it is going.

1. Quantification of all water in the Flathead Basin, both surface and ground water.
2. Quantify all water usage/rights and disclose them to the public.
 - a. Tribal.
 - b. Non-tribal.
 - c. Off reservation water rights holders.
 - d. Flathead Irrigation Project.
3. Quantification of agricultural land on the reservation.